

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CITY OF HUNTINGTON, WEST VIRGINIA

Plaintiff,

v.

CIVIL ACTION NO. 3:17-01362

AMERISOURCEBERGEN DRUG
CORPORATION, et al.,

Defendants.

CABELL COUNTY COMMISSION,

Plaintiff,

v.

CIVIL ACTION NO. 3:17-01665

AMERISOURCEBERGEN DRUG
CORPORATION, et al.,

Defendants.

PLAINTIFFS' MOTION FOR A BENCH TRIAL MANAGEMENT ORDER

The outbreak of Coronavirus Disease 2019 (COVID-19)¹ in the United States gives rise for a need to proactively address and adopt measures to ensure the preservation of the August 31,

¹ See *Court Operation Under the Exigent Circumstances Created by the COVID-19 Pandemic*, United States District Court for the Southern District of West Virginia, Misc. Action No. 2:20-mc-00052 (Filed: March 13, 2020).

2020 bench trial. Plaintiffs submit that evidentiary foundation proffers will significantly advance the litigation without fragmenting the bench trial. By way of example:

ARCOS foundational testimony: Plaintiffs request leave to proffer for the record the evidentiary foundation for the national ARCOS database obtained from the United States Department of Justice. *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919 (6th Cir. 2019). This database records every prescription opioid transaction between the Big3 Defendants and pharmacies across the nation. At trial, the Plaintiffs intend to compare the data set from Huntington/Cabell County to statewide, regional and national baselines using summaries, charts, and/or calculations, pursuant to FRE 1006. Plaintiffs submit the foundational proffer will substantially advance the litigation without fragmenting the presentation of Plaintiffs' case-in-chief.

IQVIA foundational testimony: Plaintiffs request leave to proffer for the record the evidentiary foundation for the national IQVIA database obtained during the course of discovery in MDL 2804. See generally *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011). This database records every prescription written by a doctor involving prescription opioids in the nation. At trial, the Plaintiffs intend to compare the data set from Huntington/Cabell County to statewide, regional and national baselines using summaries, charts, and/or calculations, pursuant to FRE 1006. Plaintiffs submit the foundational proffer will substantially advance the litigation without fragmenting the presentation of Plaintiffs' case-in-chief.

Plaintiffs respectfully submit this Court has wide discretion in its management of the bench trial² and should consider:

² The Judicial Conference of the United States Committee on Court Administration and Case Management provides guidance in its *Civil Litigation Management Manual* (Second Edition) (2010) on management of a bench trial (pp. 113-15).

- (a) Taking judicial notice of adjudicative facts (FRE 201);
- (b) Having counsel submit proposed findings of fact and conclusions of law before trial begins, enabling you to accept or reject findings as the trial progresses (FRCP 52(a)(1)); and
- (c) Permitting testimony in open court by contemporaneous transmission from a different location (FRCP 43(a)(1)).

These and other provisions may enable both parties to develop an adequate record and prepare for trial on August 31, 2020. Plaintiffs request this Court proactively address any discovery concerns which may be impacted by COVID-19 and implement solutions.

Dated: March 16, 2020

Respectfully submitted,

THE CITY OF HUNTINGTON

CABELL COUNTY COMMISSION

/s/ Anne McGinness Kears

/s/ Paul T. Farrell, Jr.

Anne McGinness Kears (WVSB No. 12547)

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, a copy of the foregoing was served using the Court's CM/ECF system, which will send notification of such filing to all counsel of record and was also served via email to the following:

All defendants' listserv: xALLDEFENDANTS-MDL2804-Service@arnoldporter.com

All Plaintiffs' listserv: mdl2804discovery@motleyrice.com.

/s/ Paul T. Farrell, Jr.

Paul T. Farrell, Jr. (W.Va. Bar ID 7443)